MISCELLANY.

AN UNRECONSTRUCTED REBEL'S WILL.—We are indebted to a correspondent for the subjoined extract from a will probated in one of the counties of Virginia shortly after the Civil War. It may prove not uninteresting in these days of piping peace, when the Alabama and the Virginia have joined the Federal fleet, and Lee and Wheeler the Federal army:

"I have made Several wills heretofore, when I had considerable property to give my wife & children, but since the Yankees have Stolen all my negroes & robbed me of a great deal of my other personal property, pillaging my house, breaking open all the doors, and Stealing all the Clothing they wanted, I have very little to will. They stole a gold watch from me, worth about three hundred dollars, which was a bridal present from me to my wife when we were married half a century ago. They threatened to shoot me if I did not deliver my watch to them, & burn down my dwelling house, presenting their pistols at me frequently, & I an old man of Seventy-Six, that was too weak and feeble to defend myself. I now, therefore, make my last will and testament in manner and form following, viz:

"1st. I give and bequeath to my Children and grandchildren, and to their descendants, throughout all future generations, the bitter hatred and everlasting malignity of my heart & soul against the Yankees, including all the people north of Mason's & Dixon's line; & I do hereby exhort & entreat my children and grandchildren, if they have any love or veneration for me, to instill into the hearts of their children and grandchildren, and all their future descendants, from their childhood, this bitter hatred and those malignant feelings against the aforesaid people & their descendants, throughout all future time and generations. . . . . "

CONTRACTS REQUIRING THE ARCHITECT'S APPROVAL AS A PREREQUISITE TO PAYMENT.*—American courts have in general shown greater leniency than the English in regard to the performance of express conditions precedent. In no class of cases is this fact better brought out than in suits on building contracts in which payment is to be made only when the architect's certificate is obtained. In England the builder must produce the certificate ; he can only excuse himself by proving collusion between the architect and the defendant. *Batterbury* v. *Vyse*, 2 H. & C. 42; *Clarke* v. *Watson*, 18 C. B. N. S. 278. In most of our States fraud or gross mistake in witholding the order will entitle the plaintiff to sue on the contract without it. *St. Paul etc. Ry.* v. *Bradbury*, 42 Minn. 222; *Classen* v. *Davidson*, 59 Ill. App. 106. But in New York, if the plaintiff can persuade the jury that he has substantially performed the contract he can recover in spite of the architect's disapproval. *Nolan* v. *Whitney*, 88 N. Y. 648. A recent decision in a circuit court of Ohio adopts the New York view. The plaintiff sued on a building contract containing the usual condition of payment upon presentation of the architect's certificate. He did not produce the certificate, and could not prove fraud. The jury found specially that the architect's reason for refusing the certificate was dissatisfaction with the work. The court, on appeal, sustained a general verdict in favor

* See Kidwell *v.* B. & O. R. Co., 11 Gratt. 676; Condon *v.* Southside R. Co., 14 Gratt. 302; Iage *v.* Bossieux, 15 Gratt. 83; Jas. R. & K. Canal Co. *v.* Adams, 17 Gratt. 441, 442-443; Mills *v.* N. & W. R. Co., 90 Va. 523.

of the plaintiff on the ground that it was not found that the architect's refusal was reasonable. *Wicker* v. *Messinger*, 12 Oh. Circ. Dec. 425.

To realize how inconsistent a decision of this nature is with the strict common law doctrines, it must be borne in mind that the condition was expressly precedent, that it was not fulfilled, and that no definite excuse for its breach was found by the jury. In theory, the plaintiff to recover must show that the defendant prevented the carrying out of the contract. The American courts in general, moved by the extreme rigor of express conditions, have modified the law to permit recovery in cases of fraud or gross mistake. But it is conceived that the true rule is that an honest refusal of the architect to give the certificate, no matter how mistaken he may be, debars the builder from suing on the contract. *Bradner* v. *Roffsel*, 57 N. J. Law, 412. This rule, while mitigating the harshness of the English doctrine, is yet within the fair meaning of the contract. To make it more lenient is virtually to substitute a jury for the architect. To make it more strict is to acknowledge that the latter need not give an honest judgment. Each of these results is equally undesirable, and the decision of the principal case, tending as it does to enlarge the scope of the New York doctrine, is to be regretted.—*Harvard Law Review.*

CAUTION TO TRAMP CORPORATIONS.—Incorporators under the laws of one State, with the avowed object of doing the whole or a portion of the corporate business in another State, had better closely study the decision of the United States Supreme Court, in *Pinney* v. *Nelson*, 183 U. S. 144. It is there held, without any dissent, that when a corporation is formed in one State, and by the express terms of its charter, it is created for doing business in another State, and such business is, in fact, done in that State, it must be assumed that the charter-contract was made with reference to its laws, and the liability, which those laws impose, will attend the transaction of such business.

The action was to enforce a personal stockholders' liability under the California Code against a stockholder in a Colorado company, whose charter-object was to carry on a part of its business in the State of California.

Under the provisions of the constitution and statute law of California, foreign are on the same footing as the domestic corporations, and stockholders are individually and personally liable for such proportion of the corporate debts and liabilities, as the amount of stock or shares owned by them bear to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation.

The Supreme Court had no difficulty in determining that when the Colorado corporation provided for doing business in California, it was contracting with reference to the laws of that State, and it must be presumed to know its laws.

The result of this decision will likely be to leave out of corporate declarations the object to do business in another State, in order to obviate the effect of the decision. The court, however, anticipated such an evasion, by declining to express any opinion whether the stockholders could have been held under the California statute independently of the Colorado charter-declaration.

It was long ago held by Chief Justice Marshall, as a principle of universal law, that a contract is governed by the law with a view to which it was made. *Wayman* v. *Southard*, 10 Wheaton 1, 48. The logic of this opinion will go far to throw difficulties in the way of the so-called tramp corporation.—*National Corporation Reporter.*

BY-LAWS V. CONTRACT—RETROSPECTIVE BY-LAWS OF MUTUAL BENEFIT SOCIETIES.—In the recent decision of the New York Court of Appeals in *Parish* v. *N. Y. Produce Exchange* (169 N. Y. 34) it was held that where a gratuity fund of a Commercial Exchange has, by assessments upon members and other appropriation of moneys during a series of years, been accumulated for the benefit of the beneficiaries designated in the charter, a subsequent amendment of the by-laws which, among other things, provides that the fund may be converted into cash, and, after paying all expenses, be distributed among the living subscribing members, is an attempt to devote it to an entirely different use and is unreasonable and void, not only because it destroys the rights of the members secured to them by the by-laws upon which they relied when they entered into the contract, but because it is a diversion of the fund to a purpose unauthorized by the charter. The opinion of the court by Chief Judge Parker lays down a salutary and just principle, supported by abundant authority, "that the power of a corporation, such as this one, to amend its by-laws, is a power to regulate within reasonable bounds, not a power to destroy the contract rights of its members."

The decision of the United States Circuit Court of Appeals, Third Circuit, in *Supreme Council of American Legion of Honor* v. *Getz* (December, 1901, 112 Fed. 119), is in accord with the New York doctrine. It was held that a general agreement of the members of a fraternal and insurance order, on joining the same, that they will be governed by the then existing laws of the order, and all future adopted amendments thereto, binds them only as to amendments and changes having relation to the organization generally, and does not amount to a reservation to the order of the right to alter the contract made by a member's insurance certificate without his consent, nor can such consent be implied from the fact that the body attempting to make such alterations is made up of representatives elected by the subordinate lodges. The Circuit Court of Appeals used the following language:

"It is urged on behalf of the defendant that the said Getz was represented through his accredited agents and representatives at the said fourteenth regular session of defendants, held at Atlantic City, N. J., August, 1900, and assented, through his representatives and agents, to the adoption of the by-law No. 55, above set forth, and he is bound thereby. Of course it was competent for Getz, by express agreement, to waive his right to receive anything on his benefit certificate. This he might do in person or through an agent. But it does not appear that he has done so. The affidavit of the defense fails to state how or in what manner any assent of the said Getz was given to said by-law other than that his accredited representative and agent was present at the said session of the defendant at Atlantic City when the by-law was adopted. No express agency is alleged, and we are of the opinion that sufficient facts are not stated to warrant the court in concluding that any assent was authorized or actually given. In *Hale* v. *Aid Union* the question raised here was presented to the court, and it was held that 'a contract between an association such as defendant and one of its members cannot be impaired or altered by either of the parties thereto except so far as the power to do it is reserved. The benefit certificate was accepted subject to the right of the corporation to amend its by-laws, and to change the contract so far as the by-laws made it, but not in so far as the contract is made by the benefit certificate itself.' This judgment was affirmed by the Supreme Court (168 Pa. 377, 31 Atl. 1066), and is to-day the law of Pennsylvania as interpreted by its court of last resort. The contract before us is a Penn-

sylvania contract, and must be construed according to its laws (*Assurance Soc'y* v. *Clements*, 140 U. S. 226, 1 Sup. Ct. 822, 35 L. Ed. 497)."

The opinion of the Appellate Division of the New York Supreme Court, First Department, in *Feierstein* v. *Supreme Lodge*, &c., February, 1902, printed on the first page to-day, is harmonious with and applies the principles of the cases above cited. It was held that a judgment against the recovery upon a benefit certificate by its beneficiary, on the ground of the suicide of the member who had taken out the certificate, would not be sustained, under a by-law which had been given retroactive force.—*New York Law Journal.*